



FILED
OSAH

AUG 4 2016

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

JLD SPEECH THERAPY, LLC,
Petitioner,

v.

PEACH STATE HEALTH PLAN,
Respondent.

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Docket No.: OSAH-CMO-P_DEN-
1638270-60-Schroer

Kevin Westray
Kevin Westray, Legal Assistant

FINAL DECISION

I. INTRODUCTION

Petitioner, JLD Speech Therapy, LLC (“JLD”), appealed the decision of Peach State Health Plan (“Peach State”) to recoup payments made to JLD for speech therapy services. The initial hearing was held before the undersigned administrative law judge at the Office of State Administrative Hearings (“OSAH”) on May 26, 2016, and by telephone on June 17, 2016. The record remained open until July 6, 2016, when the parties presented oral argument by telephone. JLD was represented by its owners, Jayla S. Bullock-Townsend and David Townsend. Peach State was represented by Erin Graham-Watstein, Esq.

In the Joint Status Report filed on April 28, 2016, the parties identified two primary issues in dispute in this matter: (1) whether Peach State was acting within its rights when it demanded that JLD refund an identified overpayment of \$10,547.66; and (2) whether JLD provided sufficient documentation for certain services rendered.¹ After careful consideration of all the evidence of record, the Court finds by a preponderance of the evidence that JLD failed to provide sufficient documentation of the duration of speech therapy services provided to Peach

¹ During the telephone conference held on July 6, 2016, counsel for Peach State confirmed that Peach State is no longer pursuing claims that JLD improperly submitted speech therapy prescriptions on its own letterhead. Although there is insufficient evidence in the record to determine what portion of the \$10,547.66 alleged overpayment was a result of these now-abandoned claims, this evidence is not necessary given the Court’s decision that Peach State has not established a legal right to recoup any of the claims, as discussed below.

State members by JLD. Nevertheless, because Peach State did not establish a right to recoupment of payments made to JLD, Peach State is not entitled under Georgia law to recover payments that it voluntarily made to JLD for services rendered. Accordingly, Peach State's demand for recoupment of such payments is hereby **REVERSED**.

II. FINDINGS OF FACT

A. The Parties

1.

The Georgia Department of Community Health ("DCH") is the state agency that oversees the Medicaid program in Georgia. DCH implemented Georgia Families, a managed care program that delivers health care services to Medicaid members through private care management organizations. (Exhibit R-4, pg. 7.)

2.

Peach State is a Care Management Organization ("CMO") serving Medicaid and other government services program members. Peach State is owned by Centene Corporation ("Centene"), which provides Medicaid managed care services in many states, including Georgia. (Exhibit R-4, pg. 7.)

3.

JLD is owned and operated by Jayla S. Bullock-Townsend and David Townsend, and provides speech therapy services. Ms. Bullock-Townsend is a licensed speech therapist and provided the speech therapy services that are the subject of this dispute. (Testimony of Bullock-Townsend; Exhibit R-10.)

B. Disputed Claims for Speech Therapy Services

4.

On January 21, 2015, Peach State requested medical records, for the period of January 15, 2014 through January 15, 2015, for twenty of JLD's Peach State patients. (Testimony of Jackie Tedesco; Exhibit R-3.)

5.

Upon review of the medical records, Peach State determined that 94% of the records failed to document the duration of services rendered by JLD. (Exhibit R-3.) At the administrative hearing, Peach State presented records relating to all twenty patients, but focused on the medical records of R.H., C.H., A.D., and W.W. as illustrations of the alleged documentation deficiencies. For example, Ms. Tedesco testified regarding the records of patient R.H. The second page of the case file for R.H. clearly indicates that R.H. received speech therapy services on January 16, 23, and 29, 2016, but fails to specify the time or duration of the therapy sessions. In fact, despite substantial documentation of what was done during each session, there is no documentation of when it occurred or for how long. (Exhibit R-10.) The first page of R.H.'s case file, submitted after the initial review, shows that R.H. was scheduled for speech therapy from 5:00 – 5:30 p.m. on May 5 and 12, 2015, and June 2 and 9, 2015, but does not confirm that R.H. was actually seen by the speech therapist on those dates and for that length of time. (Testimony of Tedesco; Exhibit R-10.)

6.

Much of the documentation relating to R.H. comes from progress notes that Ms. Bullock-Townsend prepared after each session. The progress notes indicate the date of service and

describe R.H.'s activities and progress during the session, but do not mention the duration of the session. According to Ms. Tedesco, it is common practice for progress notes to include when the session began and ended. (Testimony of Tedesco; Exhibit R-10.)

C. Requirements for Documentation

7.

DCH's Part II of the Policies and Procedures for Children's Intervention Services ("CIS Manual") requires practitioners that provide Medicaid services to "maintain legible, accurate, and complete charts and records in order to support and justify the services provided." (Exhibit R-8, pg. IX-4.)

8.

"For reimbursement purposes, such records shall be legible and shall include at a minimum: [] date(s) of service; time of visit; duration of visit; description of services rendered and response of member." (Exhibit R-8, pg. IX-4.) (emphasis added.)

9.

During the telephone conference on July 6, 2016, the parties stipulated that the medical records provided do not document the duration of speech therapy services provided. The Court's review of the records submitted confirmed the stipulation of the parties.

D. The Audit

10.

Peach State's audit program was established to look for potential fraud, waste, or abuse. Peach State conducts two types of audits: pre-payment reviews and retrospective audits. Pre-payments reviews are routine and serve as a probe to check for potential issues. Retrospective

audits, which Peach State conducts after it has already paid the claims, are more holistic. (Testimony of Hayley Fisher, Senior Manager in Centene's Compliance Audit Group.)

11.

In this case, a retrospective audit of JLD was triggered when Peach State received notice that JLD might be submitting referrals on JLD's own letterhead. (Testimony of Fisher; Exhibit R-3.)

12.

On October 8, 2014, Centene's Special Investigations Unit ("SIU") completed a preliminary review of JLD. After completing the preliminary review, the SIU determined it needed medical records from JLD for further review. (Exhibit R-3.)

13.

To begin the review, the SIU requested medical records for twenty unique JLD patients, spanning dates of service from January 15, 2014, through January 15, 2015. The SIU's review of the medical records revealed that approximately 94% of the records did not specify a time or duration of the service rendered by JLD. (Exhibit R-3.)

14.

On October 26, 2015, Peach State sent JLD a Notice of Overpayment and Proposed Recoupment Action ("Notice of Overpayment") that notified JLD of two issues discovered during the audit. The issues were: (1) that approximately 94% of JLD's services lacked some portion of documentation—primarily documentation of the duration of the patient's visit; and (2) that some referrals to speech therapy at JLD were written on JLD letterhead, not the letterhead of the referring physician. As a result of the audit, Peach State sought to recoup

\$10,547.66 in payments it had made to JLD for services rendered to Peach State members during the audit period. (Exhibit R-14.)

15.

JLD filed an appeal of the Notice of Overpayment. On January 15, 2016, Peach State sent JLD an Appeal Response, denying JLD's appeal of the Notice of Overpayment. (Exhibit R-15.)

16.

On January 28, 2016, JLD appealed Peach State's denial and requested an administrative hearing. (Attachment to OSAH Form 1.)

E. Right to Recoupment

17.

Peach State pre-authorized JLD to provide speech therapy services to its members. (Exhibit P-1.)

18.

Peach State has created a manual ("Provider Manual") to govern its relationship with providers of medical services to its members. Among other things, the Provider Manual authorizes Peach State to seek recoupment of overpayments made to its providers. Specifically, the Provider Manual states "[i]f [Peach State] determines that clinical documentation does not support the claims payment in some or all circumstances, Peach State will seek recovery of all overpayments." (Exhibit R-4, pg. 99.) At the administrative hearing in this case, Peach State initially contended that JLD had entered into a contract with Peach State and, under the terms of such contract, had agreed to be bound by the Provider Manual. However, Peach State

subsequently represented to the Court that it had been mistaken and that it had not entered into a provider agreement with JLD. In fact, despite a number of opportunities, Peach State has not presented any evidence of a contract between JLD and Peach State or an agreement by JLD to abide by the Provider Manual and its recoupment provisions.²

19.

Instead, Peach State contends that JLD, by virtue of its status as a provider of Medicaid/PeachCare for Kids services, is bound by DCH's Part I of the Policies and Procedures for Medicaid/PeachCare for Kids ("Medicaid Manual") and DCH's CIS Manual. (June 20 Email.) Peach State further argued, during the July 6, 2016 telephone conference, that Peach State was authorized, under Part I of the Medicaid Manual, to recoup overpayments from JLD.

20.

Section 407 of the Medicaid Manual authorizes "the Division," which is defined as DCH-Medicaid Division, to recoup payments previously made to a provider in certain situations, including when "the provider has failed to comply with all the terms and conditions of participation related to the service(s) for which a claim has been paid." (Exhibit R-17, pgs. Definitions-3; IV-18.) The Medicaid Manual does not address whether a CMO, such as Peach State, has the right of recoupment or whether a Medicaid provider is obliged to repay a CMO when the provider has failed to comply with the CMO's manual.

² In addition to statements by Peach State's counsel on the record at the hearings, counsel sent an electronic mail message to the Court on June 20, 2016, which was intended for filing with the Court and has been included as part of the record of this case ("June 20 Email").

F. The Administrative Hearing

21.

An initial administrative hearing was held on May 26, 2016. Due to the parties' failure to exchange documents in advance as required by the Pre-Hearing Order, the hearing was continued, and a second day of hearing, to be completed by telephone, was scheduled for June 17, 2016. As discussed above, at both the May 26, 2016 hearing and the June 17, 2016 telephone hearing, Peach State asserted that the relationship between Peach State and JLD was governed by a contract. The Court ordered that the record remain open for a short period of time following the June 17th hearing in order for Peach State to submit a copy of the contract.

22.

A few days later, Peach State admitted in the June 20 Email that there was no contract. As a result of the new contentions in the June 20 Email, the Court held the record open until July 6, 2016, in order to hear oral arguments from the parties on the issue of whether Peach State had established a right to recoup based on the evidence in the record. On July 6, 2016, Peach State asserted that, despite the lack of a formal contract, it had a right to recoup payments made to JLD based on Section 407 of the Medicaid Manual, which authorizes DCH to recoup payments made to providers. Peach State argued that its contract with DCH allowed it to step into DCH's shoes.³

³ Peach State did not tender either the contract between Peach State and DCH or the participating provider agreement between JLD and DCH.

III. CONCLUSIONS OF LAW

1.

Peach State bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07. The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

The relationship between Peach State and JLD is not governed by a written contract.⁴ Nevertheless, Peach State asserts that it still has the right to recover payments made to JLD. Under Georgia's voluntary payment doctrine, however, "money voluntarily paid may not ordinarily be recovered." *Williams Service Group, LLC v. National Union Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 65828 (N.D. Ga. June 20, 2011), quoting *Wallis v. B & A Const. Co.*, 273 Ga. App. 68, 73 (2005). The Georgia legislature has codified this doctrine in Code Section 13-1-13:

Payments of claims made through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed voluntary and cannot be recovered unless made under an urgent and immediate necessity therefor or to release person or property from detention or to prevent immediate seizure of person or property. Filing a protest at the time of payment does not change the rule prescribed in this Code section.

O.C.G.A. § 13-1-13.

3.

As the Eleventh Circuit noted, "Georgia courts regularly apply the voluntary payment doctrine to contractually mandated payments." *Camafel Bldg. Inspections, Inc. v. Bellsouth Advertising & Publishing Co.*, 298 F. App'x 822, 823 (11th Cir. 2008) (citations omitted).

⁴ Peach State did not present evidence of an oral contract between Peach State and JLD. However, even assuming *arguendo* that Peach State had presented some evidence of an oral contract through, for example, evidence of a course of dealing as Respondent's counsel argued, there would still be no evidence that JLD had agreed to recoupment provisions.

“Moreover, ‘[t]he party seeking to recover payment bears the burden of showing that the voluntary payment doctrine does not apply.’” *Pew v. One Buckhead Loop Condominium Assoc., Inc.*, 305 Ga. App. 456, 461 (2010) (citations omitted). Peach State presented no evidence as to why the voluntary payment doctrine should not apply in this case.

4.

Peach State and JLD were free to contract on any terms they wished and could have agreed that, notwithstanding the voluntary payment doctrine, Peach State had the right to recoup voluntary payments.⁵ They failed to do so, however, and it is settled law in Georgia that “if the parties do not make a contract, a court is powerless to make one for them.” *Georgia Contracts: Law and Litigation*, John K. Larkins, Jr. (2nd Ed., 2011); *see, e.g., Villani v. Edwards*, 251 Ga. App. 293, 294 (2001); *Southeastern Underwriters v. Aflac*, 210 Ga. App. 444, 446 (1993); *Sierra Associates, Ltd. v. Continental Illinois Nat'l Bank & Trust Co.*, 169 Ga. App. 784, 791 (1984); *Scott v. Lewis*, 112 Ga. App. 195, 197 (1965). Accordingly, without a contract to the contrary, the voluntary payment doctrine bars Peach State’s attempt to recover payments made to JLD.

5.

After acknowledging the lack of a contract between Peach State and JLD, Peach State asserted that it still had a right to recoup payments made to JLD based on Section 407 of the Medicaid Manual, which authorizes DCH to recoup payments made to providers. Peach State

⁵ *See generally Porubiansky v. Emory University*, 156 Ga. App. 602, 603 (1980) (“Unless prohibited by statute or public policy, the parties are free to contract on any terms and about any subject matter in which they have an interest, and any impairment of that right must be specifically expressed or necessarily implied by the legislature in a statutory prohibition and not left to speculation.”).

argued that its contract with DCH allowed it to step into DCH's shoes.⁶ Peach State further argued that, due to JLD's contract with DCH (which Peach State argues governs the relationship between DCH and JLD, as a Medicaid provider), JLD is bound by the Medicaid Manual. However, when a written contract is at issue, in order to prove the contents of the contract, the original contract itself is required. O.C.G.A. § 24-10-1002. Peach State provided no evidence, much less the original documents, to prove the terms of contracts between itself and DCH or between JLD and DCH.⁷ Accordingly, the Court will not consider arguments that are based on contractual provisions in contracts that were not tendered into evidence.

6.

Finally, Peach State has not identified any other statutory or regulatory authority that authorizes a CMO to recoup payments made to a provider of medical services based on the provider's failure to abide by documentation guidelines. As the party seeking recoupment of

⁶ Peach State also characterized itself as a steward of public funds—which is inaccurate. A Rhode Island court has held that funds used by a Medicaid managed care organization (“MCO”) to pay providers are private, not public funds, applying “an essential principle articulated by the United States Supreme Court in *Allison Engine* – that the definition of ‘government’ or ‘public’ funds has limitations once the funds are transferred from the government to an employee [or private entity] ... Here, DHS is supplying [MCO] with monthly capitation payments – “public” funds – in return for [MCO’s] provision of health care services for its [Medicaid] enrollees. Like an employee’s paycheck, these capitation payments are in essence compensation for [MCO’s] efforts to provide health care services for its [Medicaid] enrollees, and upon transfer from DHS, these funds become [MCO’s] own private funds. Thus despite the fact that the capitation funds originate with the State, when [MCO] subsequently pays its medical service providers for services rendered, it is doing so with its own private funds.” *Drs. Pass & Bertherman, Inc. v. Neighborhood Health Plan of Rhode Island*, 2009 R.I. Super. LEXIS 61 (May 5, 2009), citing *Allison Engine Co., Inc. v. United States*, 128 S.Ct. 2123 (2008).


⁷ See generally *Pruitt Corp. v. DCH*, 284 Ga. 158, 160 (2008) (“A provider of medical assistance which signs with DCH a statement of participation that incorporates by reference DCH’s manual of policies and procedures enters into a contractual relationship with DCH.”) (citation omitted); *Briarcliff Haven v. Dept. of Human Resources*, 403 F. Supp. 1355, 1364 (N.D. Ga. 1975) (A Medicaid provider agreement entered into by a provider . . . and DCH “is an arms-length business contract.”).

payments voluntarily made, it was incumbent upon Peach State to establish a legal basis for such relief. It has failed to do so in this case.

IV. DECISION

For the above and foregoing reasons, Peach State's decision to recoup \$10,547.66 in payments previously made to JLD is hereby **REVERSED**.

SO ORDERED, this 4th day of August, 2016.


KIMBERLY W. SCHROER
Administrative Law Judge